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Supreme Court of the United States

October Term, 1965

No. 399

SARAH SMITH, as Administratrix of the Estate of JOHN C. SMITH, deceased, and GEORGE THOMAS HOLLEY,
Petitioners,

v.

UNITED STATES OF AMERICA and MARINE TRANSPORT LINES INC., as owners of the USNS POTOMAC,
Respondents.

PETITION AND BRIEF ON BEHALF OF AMERICAN TRIAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

AMERICAN TRIAL LAWYERS ASSOCIATION
By LOUIS R. HAROLDS, ESQ.,
Chairman of the Admiralty Section
Of Counsel and on Brief.

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PETITION AND BRIEF

To the Honorable Justices of the United States Supreme Court:

The American Trial Lawyers Association respectfully joins in the petition for a writ of certiorari and seeks leave to file the within petition and brief in support of same as *amicus curiae,* and respectfully alleges as follows:

1. The American Trial Lawyers Association is a national bar association consisting of more than 15,000 lawyers primarily engaged in the practice of personal injury law.

2. Said Association, and more particularly the members of its Admiralty Section, many of whom are handling related cases, are vitally concerned with the above petition presently before this Honorable Court because of the existence of numerous suits throughout the United States involving civilian merchant seamen, injured aboard vessels such as the USNS Potomac, which are commonly referred to as M.S.T.S. vessels *i.e.*, operated in the Navy Military Sea Transportation Service.

3. Prior to the decision of Honorable Walter E. Hoffman, the United States District Judge who ruled in the instant case, and its affirmance by a divided Court of Appeals, many suits had been filed against the respective private employers of injured merchant seamen, shipping companies which were then deemed and acknowledged by all to be proper party defendants. These firms were designated the operating Contractors pursuant to the express terms of the standard form of agreement for M.S.T.S. vessels entered into between the United States of America and the various private shipping companies. Such suits were filed pursuant to the provisions of the Jones Act (46 U. S. C. § 688), which granted to merchant seamen a right to sue their "employers" in civil actions, with a right to trial by jury; and these were generally filed with alternate claims pursuant to the provisions of the general maritime law based on allegations of unseaworthiness and for related benefits.

4. Prior to the decision of the District Court in the instant case, the private operating companies had generally admitted operation, management and control of such vessels in the various civil jury suits filed to recover damages for shipboard injuries on M.S.T.S. ships, claims which were duly covered by insurance protection.

However, subsequent to the decision of Judge Hoffman in the instant case, and the affirmance thereof by the divided Court of Appeals (for the Fourth Circuit), there resulted a conflict among the circuits, and resultant uncertainty among the lawyers handling such cases.

It is respectfully urged that this conflict should be resolved, particularly since said private operating shipping companies have since been seeking permission from various District Courts for leave to file belated amended answers, withdrawing their prior admissions of ownership, operation and control of such vessels, and alleging that the

sole proper party to be sued now was the United States of America, under the provisions of the Suits in Admiralty Act (46 U. S. § 741, *et seq.*) and/or the Public Vessels Act (46 U. S. C. § 781, *et seq.*), which do not give a right to trial by jury, and which contain a two year statute of limitations, rather than the three year limitation period provided by the Jones Act.

5. As was pointed out by Circuit Judge J. Spencer Bell, in his dissenting opinion in the Court of Appeals below, the Government had previously persuaded the Court of Appeals for the Third Circuit in *The Petition of the United States*, 154 F. Supp. 714 (D. C. Del., 1957) aff'd 259 F. 2d 608 (C. A. 3rd, 1958), as well as the United States District Court for the Southern District of New York in *Chowaniec* v. *United States*, 149 F. Supp. 251 (S. D. N. Y., 1956), that the Government was only the owner of these vessels, while the private steamship firms operating the vessel (under the very same contract as is involved herein) were the employers of the members of the crew; that since the Government was not their employer, the private steamship firms were the proper parties to be sued.

6. The position previously taken by the Government was in conformity with many cases which recognize that the Government frequently engages private contractors to operate certain of its facilities and activities under contractual arrangements whereby the workmen are employees of the contractors only, despite the fact that the Government reserves to itself a certain amount of general supervision and control in order to protect its property, and to see to it that the purposes for which the work is being carried out with Government funds, are met *i.e.* that the general supervision of the Government does not alter the fact that the contractor remains liable for the details concerning the manner and the method of doing the work, the contractor doing the hiring and firing, paying social security taxes, etc.

See:

Powell v. *United States Cartridge Co.*, 339 U. S. 497 (1950), where employees of a private contractor, operating a Government-owned munitions plant under a cost plus fixed fee contract, were held not to be employees of the Government;

Maryland v. *United States*, 85 Sup. Ct. 1293 (1965) where a civilian National Guard pilot, trained and equipped under Federal standards, and permitted to use Federal equipment during training, during which the United States provided supplementary emoluments, was nevertheless not held to be an employee of the United States when his jet training plane, assigned to the National Guard, resulted in a collision with a private plane;

Anselmo v. *Ailes*, 235 F. Supp., 203 (E. D. N. Y., 1964) where employees at a missile base were held not to be Government employees despite the fact that the Government had inserted into the contract many detailed rights of supervision to insure that the work was properly performed and that its money was not wasted;

Stratton v. *United States*, 213 F. Supp. 556 (D. C. Tenn., 1962) where an employee, working at a Government-owned facility, was killed while making tests for the Air Force, and was held to be only an employee of the private corporation despite a measure of Governmental control;

Mahoney v. *United States*, 216 F. Supp. 523 (D. C. Tenn., 1962) where an employee at Oak Ridge became ill due to radioactive exposure, while working for a firm which had a contract with the Atomic Energy Commission, was held not to be a Government employee, even though the Government had limited control and paid the expenses of the work in the final analysis.

7. In *Cosmopolitan Shipping Co, Inc.* v. *McAllister,* 337 U. S. 783, 69 Sup. Ct. 1317 (1949), a majority of the Court pointed to certain express provisions in the General Agency Agreement under which War Shipping Administration vessels were operated during World War II. The G. A. A. contract there provided that "The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel."

On the other hand, the present MSTS standard form of contract applicable here contains explicit language that the members of the crew shall be employees of the private operating company, and not of the United States. It is clear from this agreement that these private companies, as Contractors, have retained control over the manner and method of performing the details of the work with the right to hire and fire, and the obligation to pay Social Security as employers; while the Government has only retained certain general supervisory duties.

Under the MSTS contract, it is therefore plain that, apart from perhaps designating various ports to which the vessel shall proceed (as may any time charterer), and permitting the use of MSTS local officers ashore for berthing instructions, etc. (as would a local agent acting for the charterer in a time charter part), it had deprived itself of the actual details of management and navigation of the vessel. In short, many of the functions which the Government has reserved to itself under the MSTS contract are similar to the general functions of a ship's husbanding agent, rather than the type of control exercised by a ship operator.

8. In light of *Cosmopolitan Shipping Co. Inc.* v. *McAllister, supra,* and many other cases decided at about that time, which involved litigation arising out of the World

War II effort on the so-called "General Agency" contract ships, it is inconceivable that the Government used careless language when it drafted the new subsequent contracts in time of peace for the operation of M. S. T. S. ships. It is inconceivable that the Government lawyers were unaware of the many cases which interpreted the effect of the old General Agency Agreement which is no longer in use. Where the old GAA agreement referred to the operating companies as "Agents", the new M. S. T. S. contracts refer to them as "Contractors"; where the old GAA contract explicitly made the master an employee of the United States, with full control over all aspects of the vessel's management, the present M. S. T. S. contract provides that the members of the crew shall be employees of the Contractor and not employees of the United States. Nowhere under the M. S. T. S. agreements are the steamship companies referred to, or limited to activity as "Agents", "Agencies" or "employees" of the United States, and consequently the proviso contained in 46 U. S. C. A. § 745 has no application here; and further a Jones Act suit by a seaman against his own private employer is not "the same subject matter" as a third party admiralty suit against the Government (which is not his employer), based on its liability as a shipowner. Compare *Reed* v. *SS Yaka*, 373 U. S. 410, 83 Sup. Ct. 1349 (1963) and *Grillea* v. *United States*, 232 F. 2d 919 (C. A. 2d, 1956).

9. Upon information and belief, many merchant seamen injured aboard such vessels will be in a state of uncertainty as to whether they will be deprived of their respective causes of action by reason of the expiration of the two year statute of limitations in the event that the decision of the Court below in the instant case, is permitted to stand; and the remainder will be uncertain whether they are to be deprived of their right to trial by jury. (Compare *Fitzgerald* v. *United States Lines*, 374 U. S. 16 (1963).)

There will also be uncertainty concerning questions of venue and jurisdiction which apply to suits against the Government.

The tendency of the Supreme Court has been to brush aside technical attempts to deprive injured maritime workers of substantial rights by reliance upon technical distinctions which are mere matters of form, rather than of substance.

Reed v. *S. S. Yaka, supra;*
Calbeck v. *Travelers Insurance Co.*, 370 U. S. 114, 82 Sup. Ct. 1196 (1962).

10. The American Trial Lawyers Association, and more particularly the members of its Admiralty Section, are concerned lest the impact of the matters referred to above be overlooked, and important issues in this case be decided without carefully considering the confusion created by the existing conflict which now exists in the light of *The Petition of the United States, supra* and *Chowaniec* v. *United States, supra,* when compared with the instant case in view of the vital distinctions between the General Agency Agreement provisions which were before the Supreme Court in *Cosmopolitan Shipping Co. Inc.* v. *McAllister,* 37 U. S. 783, 69 Sup. Ct. 1317 (1949), and the type of operating contract involved herein.

WHEREFORE, the American Trial Lawyers Association respectfully petitions this Honorable Court for leave to submit the within petition and brief as *amicus curiae* in support of the petition for a writ of certiorari, and prays that this Court will grant the writ, and resolve the conflict among the Circuits and settle this important issue of law which involves the rights of many other merchant seamen similarly situated; and in the event said petition is granted,

it respectfully petitions for leave to present oral argument by Louis R. Harolds, Esq., Chairman of the Admiralty Section of said Association.

Respectfully submitted,

AMERICAN TRIAL LAWYERS ASSOCIATION

By LOUIS R. HAROLDS, ESQ.,
Chairman of the Admiralty
Section
Of Counsel and on Brief.